In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1412

SKYLINE AVIATION, INC.,
Respondents,

vs.

ARNOLD S. BARBER, NANCY M. BARBER, AND HORIZON AIRWAYS, INC.,
Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this action on December 9, 1977, as to which a timely motion for rehearing was denied on January 4, 1978. That judgment affirmed an order of the United States District Court entered following a jury verdict on October 22, 1976, supplemented by an order awarding attorney fees filed October 29, 1976. Both are printed herein as Appendix A.

CITATIONS TO OPINIONS BELOW

The judgments and orders of the United States District Court for the Eastern District of Missouri, Northern

Division (which were not officially reported) are printed as Appendix A hereto. The opinion and judgment of the United States Court of Appeals for the Eighth Circuit (not to be published) affirming the order and judgment of the District Court, are printed as Appendix B hereto. The memorandum of the Court of Appeals denying rehearing or rehearing *en banc* is printed as Appendix C hereto.

JURISDICTION

The judgment and decision of the Court of Appeals for the Eighth Circuit was entered on December 9, 1977. Petitioners' timely motion for rehearing was denied on January 4, 1978.

The jurisdiction of this Court is invoked pursuant to 28 USC 1254(1).

QUESTIONS PRESENTED

I.

Did the Court of Appeals err in affirming a recovery under 15 USC 2, notwithstanding that the uncontroverted proof showed that Horizon's activities of which Skyline complained did not affect an appreciable part of interstate commerce, a position apparently contrary to the applicable decisions of this Court?

II.

Did the Court of Appeals err in affirming a recovery under 15 USC 2, notwithstanding that the uncontroverted proof showed that Horizon's activities of which Skyline

complained did not affect the interstate aspect of Skyline's business, apparently contrary to the applicable decisions of this Court?

III.

Did the Court of Appeals err in permitting plaintiff to make proof of the filing by defendant Horizon, in 1973, of an anti-trust suit against plaintiff and others, by reason of applicable decisions of this Court holding that such an act was protected under the First Amendment to the Constitution of the United States, and did the Court err further in affirming an award of damages based in part on the loss of anticipated profits from an anticipated contract, the consummation of which was arguably prevented by the filing of such suit?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment to the Constitution of the United States, 28 USC 1337, 15 USC 2, 15 USC 4, and 15 USC 15, the texts of which are printed in Appendix D herein.

PAYMENT OF JUDGMENT

In lieu of the posting of a supersedeas bond to stay the mandate of the Court of Appeals, defendants elected to pay that portion of the judgment liquidated as of the time of the filing of this petition. The satisfaction of judgment is printed as Appendix E herein. Plaintiff has filed an application for additional attorney fees on appeal which has not been ruled upon by the District Court.

STATEMENT OF THE CASE

The initial complaint in this action was filed on December 4, 1974 in the United States District Court for the Eastern District of Missouri, Northern Division. An amneded complaint, on which the case was tried, was filed on February 11, 1975, alleging violation by Horizon of Section 2 of the Sherman Act, 15 USC 2. The amended complaint also contained a second count which attempted to state a common law state court claim for damages based upon alleged interference with contractual or prospective contractual arrangements between plaintiff and the City of Kirksville, Missouri, which was dismissed by plaintiff on the day of trial.

Count I of the complaint alleged that plaintiff was a corporation engaged in the interstate transportation of freight and passengers by airplane and in the providing of flight training and aviation connected sales and services to the public, at Cannon Memorial Airport, Kirksville; that defendants Arnold S. Barber and Nancy M. Barber were husband and wife and the principal owners of the defendant Horizon Airways, Inc.; that Horizon Airways, Inc. was also engaged in the interstate transportation of freight and passengers by aircraft and in providing aviation connected sales and services to the public, as a competitor of plaintiff's airline. It was further alleged that the City of Kirksville solicited bids for a fixed base operator at Cannon Memorial Airport, owned by the City of Kirksville, that plaintiff Skyline's bid was accepted and that plaintiff thereafter began preparation to take over as fixed base operator in reliance on a forthcoming contract with the City of Kirksville; that on May 25, 1973, an anti-trust suit was commenced by Horizon against the City of Kirksville, plaintiff, Dale I. Glaspie, principal owner of plaintiff, and one

Charles Esterline, for damages, and for an injunction to prevent the City of Kirksville from consummating a contract with plaintiff, which action was dismissed by the United States District Court, Eastern District of Missouri, on April 2, 1974.

The unlawful activities of defendants were described as "Sherman 2 attempt to monopolize"; that the relevant geographic market was the greater Kirksville area, including Cannon Memorial Airport; that the relevant product market was flight instruction, storage of aircraft, maintenance and repair of aircraft, instrument overhaul, aircraft fuel sales, aircraft charter service, aircraft sales and rentals, weather reporting service, and flight training service; that there was a dangerous probability that defendants' attempt to monopolize would suceed; that the activities of defendants were done with the specific intent to drive plaintiff out of the fixed base operation business and to gain a monopoly therein, and that such activities included:

(a) The filing of the anti-trust suit on May 25, 1973, which caused the City of Kirksville to fear contracting with plaintiff and ultimately to refuse to contract with plaintiff.

(b) That defendants charged prices for charter flights below its cost of operation, provided flight instruction below its cost of operation, falsified records in an attempt to receive approval from the Missouri Department of Education so as to obtain benefits from the Veterans Administration by operating an approved flight school, and attempted to interfere with plaintiff's flight training business through interference with student training furnished by plaintiff's president, Glaspie, personally, to Northeast Missouri State University of Kirksville.

By leave, defendants filed their first amended answer on February 27, 1976. The second defense denied that the Court had jurisdiction of Count I of plaintiff's amended complaint because plaintiff's contacts with, and engagement in interstate commerce was so minimal as not to come within Section 4 of the Clayton Act and consequently not within 15 USC 2 or 15 USC 15, and denied that plaintiff's engagement in interstate transportation of freight and passengers for hire by airplane at Cannon Memorial Airport was more than minimal and occasional. Defendants admitted the fling of an anti-trust action on May 25, 1973, and that its purpose was to seek damages and to prevent the City of Kirksville from consummating its contract with Skyline, and alleged affirmatively that its reason for doing so was because of an apprehended threat to its business life and that the same was a legitimate exercise of defendants' constitutional right to petition for redress of grievances guaranteed by the First Amendment to the Constitution of the United States. Defendants further denied deliberate below-cost operation and stated affirmatively that any losses sustained were developmental losses occasioned by the operation of defendants' commuter airline, an activity which did not compete with any business of plaintiff, and that any losses suffered by plaintiff were not attributable to defendants' pricing structure which was equal to and consistent with that employed by other fixed base operators similarly situated.

The cause was tried to a jury on October 19-22, 1976, before Honorable James H. Meredith, Chief Judge, United States District Court for the Eastern District of Missouri, Northern Division, at Hannibal, Missouri, and resulted in a verdict in favor of plaintiff and against all defendants in the amount of Twelve Thousand Five Hundred Dollars ($12,500.00). Said verdict was trebled and judgment was

entered thereon on October 22, 1976, in the amount of Thirty-Seven Thousand Five Hundred Dollars ($37,500.00). Thereafter, on October 29, 1976, Judge Meredith entered a supplementary judgment in favor of plaintiff, for attorney fees, in the amount of Fifteen Thousand Dollars ($15,000.00). Defendants timely filed their motion NOV and for a new trial on November 1, 1976, which motions were overruled on January 19, 1977. On February 17, 1977, defendants timely filed in this Court their notice of appeal pursuant to 28 USC 1291, 1292. On February 28, 1977, plaintiff appealed from the attorney fee judgment entered on October 29, 1976, pursuant to the same statute. No memorandum opinion was published in this case.

On December 9, 1977, the judgment of the District Court was affirmed by the United States Court of Appeals for the Eighth Circuit. Petitioners' timely motion for rehearing, or in the alternative, for rehearing *en banc* was overruled by the Court of Appeals on January 4, 1978.

Dale Glaspie, Kirksville, was the manager and owner of the plaintiff corporation, who will be referred to herein respectively as "Glaspie" and "Skyline". A. S. Barber, a dentist, and Nancy M. Barber, his wife, of Kirksville, were the owners of defendant Horizon Airways, Inc., and have been, and will be referred to herein, collectively, as defendants, and as "Horizon".

Skyline was incorporated on November 5, 1970; Glaspie was the principal owner of the stock. Within a month after Skyline was incorporated, Charles Esterline became a shareholder and continued as such until January 1, 1973, following which Glaspie and Skyline performed services for him for some time in payment of his stock. Esterline was Mayor of Kirksville in May, 1973. Skyline was a "fixed base operator" (a purveyor of aviation-related sales

and services at an airport), at Cannon Memorial Airport, located five (5) miles south of Kirksville. In 1970, Skyline offered flight training instruction and aircraft rental, and in 1971 obtained authority to, and thereafter did engage in aircraft charter service, both intrastate and interstate.

Kirksville is located in northeast Missouri, approximately one hundred thirty (130) air miles northeast of Kansas City and one hundred forty (140) air miles north and slightly west of St. Louis, and has a population of sixteen thousand (16,000). There are other fixed base operations located at airports at Quincy, Illinois, Trenton, Missouri, and Ottumwa, Iowa, all of which offered the same services as Skyline at all times here in question. The same thing was true of Columbia, Chillicothe, and Hannibal, Missouri, located within ninety (90) miles of Kirksville.

Horizon commenced business on April 4, 1972, as a scheduled air commuter service under Part 135 authority granted by the Civil Aeronautics Board, with two flights per day between Kansas City and Kirksville, to which was later added three scheduled flights per day to St. Louis. In September, 1973, other service divisions were added which included charter, flight training and aircraft rental. Later added was a division devoted to gasoline sales and service. Horizon was also a FBO at Cannon Municipal Airport.

The proof was uncontroverted that Horizon conducted no activity which competed with any activity of Skyline until September, 1973, and then only in the area of local flight training and aircraft rental.

Skyline showed a loss during every year of its existence; in 1971, a loss of $320.00; in 1972, a loss of $3,932.85; in 1973, a loss of $10,870.42; in 1974, a loss of $12,071.35, and in 1975, a loss of $466.11. At the time of its incor-

poration in 1970, Skyline had a total capital of $7,000.00. On December 31, 1972, Skyline's net worth was $1,715.48, and by December 31, 1973, Skyline had a negative worth of $9,154.94.

Although Horizon's dollar volume was always greater than Skyline's by reason of its commuter operation, its financial picture was equally bleak. By September 30, 1976, Horizon's accumulated losses were $109,408.00, due principally to the scheduled commuter operation. Skyline's economist witness, Kuhlman, stated affirmatively that Horizon's commuter operation did not compete with any activity of Skyline which did not, of course, maintain a commuter operation.

From the beginning of its operation, Barber and Horizon were obliged to deal with an escalating series of difficulties with the City of Kirksville, each of which appeared to be designed either to impede the development of Horizon, or aggrandize Skyline. These difficulties included a refusal by the city to permit Horizon to fuel its own aircraft; to make available to Horizon space in municipally owned hangars; to make terminal space available to Horizon, although Glaspie occupied terminal space rent-free. On occasions, terminal gates were locked, denying terminal access to Horizon's commuter passengers. The city also refused to lease ground to Horizon so it could build a hangar. There was also a controversy over a unicom radio frequency which caused a formal hearing between the city and Horizon before an FCC Administrative Law Judge, resulting in the award of the frequency to Horizon. These difficulties culminated in a city decision in 1973 to award an exclusive fixed base operator contract at Cannon Memorial Airport to Skyline, after solicitation of bids, notwithstanding that the bid submitted by Horizon was monetarily more favorable to the city. Horizon thereupon, on

the advice of counsel, filed an anti-trust action against the City of Kirksville, Glaspie, Skyline, and the then Mayor and sometime Skyline shareholder, Charles Esterline, in the United States District Court for the Eastern District of Missouri, Northern Division. The evidence was uncontroverted that this was the only suit or proceeding of any kind ever filed by Horizon against Skyline or Glaspie. This suit was dismissed prior to trial on the ground that the acts of municipalities were shielded from the proscriptions of the Sherman Act, a proposition which this Court has recently re-examined. There was proof tending to show that the filing of such suit was a factor in the decision of the Kirksville City Council not to award an FBO contract to Skyline. It did not, however, do so even after the dismissal of such suit in 1974. Skyline was permitted, over objection, to make proof of the filing of such suit, the alleged effect thereof, and of the damages it suffered by reason of having been deprived of anticipated profits from the FBO contract which never materialized. All damages claimed by Skyline for 1973 were pleaded and proved to have flowed only from such cause, notwithstanding that the issue of damages for the years 1973 to the date of trial in 1976, were submitted generally to the jury in one instruction.

Skyline also had proof from its economist, Kuhlman, that Horizon engaged in predatory pricing practices against Skyline, *but only in the area of flight training and aircraft rental.* Skyline had proof from three witnesses that the hourly rate charged by Horizon for one type of flight training aircraft was at times below cost. Horizon had testimony from seven witnesses that its rate for that particular aircraft was approximately what was being charged at all times pertinent by fixed base operators similarly situated. There was no proof of predatory pricing or other anti-competitive conduct on the part of Horizon insofar as it competition with Skyline in the charter business was concerned.

The evidence with regard to the interstate aspects of Skyline's business may be fairly summarized as follows:

1. Glaspie testified that Skyline engaged in the interstate transportation of freight, but admitted that the same occurred "on several occasions throughout the year, and exactly when I wouldn't know", and that he did not know the amount of money he had received for such interstate freight hauling during the time of his operation at Cannon Memorial Airport.

2. Glaspie stated that in connection with plaintiff's flight training activities, students were taken on dual instruction cross-country flights and that thereafter, students took solo cross-country flights, but admitted that cross-country flights were not required to go outside the State of Missouri. There was no evidence concerning the number of interstate cross-country training flights, nor of the revenue generated by it.

3. Glaspie stated that he rented aircraft and that "the majority of them I would say would have to be out of state". There was no evidence of the number of such flights nor of the dollar volume generated by them.

4. Skyline purchased some of its flight training manuals from a Colorado corporation and some navigational charts from a government source in Maryland, but neither the frequency nor the dollar amounts of such purchases were shown.

5. With regard to plaintiff's charter service, the uncontroverted proof was that from 1973 to the date of

trial, plaintiff had flown a total of 82 charter flights, of which only 44 were interstate in character. Only 3 of these charter flights occurred in 1976. The uncontroverted proof further showed that Skyline's total charter income, from both interstate and intrastate flights was: 1973—$1,241.90; 1974—$4,222.42, and 1975—$1,966.54. The record is silent as to the amount or volume of Horizon's interstate charter business.

6. Plaintiff sold gasoline at Cannon Memorial Airport for its own account between December, 1974, and May, 1975, during which period 13,781.9 gallons were sold to transient customers, and 3,730.4 gallons to Missouri customers. There was no evidence concerning the dollar volume of gasoline sales during this 5 month period.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ to reconcile conflicts among the Circuits, to resolve a constitutional question of importance to the administration of justice in the Federal judicial system that should be, but has not yet been definitively decided by the Court and because a Federal question was decided by the Court of Appeals in a way which conflicts with applicable decisions of this Court, because:

I. The decision of the Court of Appeals affirmed a recovery under 15 USC 2, notwithstanding that the uncontroverted proof showed that Horizon's activities of which Skyline complained did not affect an appreciable part of interstate commerce, contrary to the applicable decisions of this Court.

II. The decision of the Court of Appeals affirmed a recovery under 15 USC 2, notwithstanding that the uncontroverted proof showed that Horizon's activities of which Skyline complained did not affect the interstate aspect of Skyline's business, contrary to the applicable decisions of this Court.

III. The decision of the Court of Appeals in this case creates the rule that the filing of a single isolated suit by Horizon against Skyline could be later employed by Skyline as evidence of intent to monopolize, thus abrogating Horizon's First Amendment right to have access to the Courts, without penalty, contrary to the applicable decisions of this Court.

IV. The decision of the Court of Appeals in this case conflicts with its own prior decisions and with decisions by Courts of Appeal for the Fifth and Seventh Circuits.

I.

The decision of the Court of Appeals affirmed a recovery under 15 USC 2, notwithstanding that the uncontroverted proof showed that Horizon's activities of which Skyline complained did not affect an appreciable part of interstate commerce, contrary to the prior decisions of this Court.

Laying aside the question that exists in this case concerning the appropriate geographical market area, it may nonetheless be said with some confidence that under no decision of this Court could Skyline's activities in connection with the transportation of freight, flight training, aircraft rental, gasoline sales, or its purchase of manuals and charts from sources outside Missouri, rise to the dignity of "affecting" an appreciable part of interstate commerce. Flight training was undeniably a local activity, despite occasional voluntary forays beyond the borders of Missouri. Gasoline sales to out-of-state transient customers, if established at all, and of undisclosed amount, is no more interstate commerce than was the business of treating out-of-state medical patients in *Elizabeth Hospital, Inc.* v. *Richardson,* (C.C.A. 8th, 1959) 269 F.2d 167. The same may be said with regard to the matter of plane rentals and manual and chart purchases. The point with regard to these activities will not be further belabored.

With regard to interstate charter flights Glaspie testified that beginning with the year 1973 (during nine (9) months of which Horizon conducted no activity at Cannon Memorial Airport which competed with any activity of Skyline's) through October 19, 1976, Skyline had flown interstate charters of twenty-six thousand one hundred eighty-two (26,182) miles, and intrastate charters of eleven thousand one hundred seventy-two (11,172) miles. Glaspie admitted that only three (3) charters of any kind had

been flown by plaintiff in 1976 and that during the period mentioned, only a total of eighty-two (82) charters had been flown, of which only forty-four (44) were interstate in character. Further light on the subject is shed by plaintiff's answer to defendants' interrogatory number 50, in which plaintiff swore that its *total* charter income for the years 1973-1975 were in the amount of Seven Thousand Four Hundred Thirty Dollars Eighty-Six Cents ($7,430.86). At no time did Skyline adduce proof of its charter rates, nor was there proof of Skyline's charter dollar volume for the year 1976. However, the average charter rate charged by Skyline for the years 1973-1976 can be computed by dividing total charter income for such years (Seven Thousand Four Hundred Thirty Dollars Eighty-Six Cents ($7,430.86)) by total charter miles for such years (thirty-five thousand four hundred twenty-six (35,426)), which yields an average rate per mile of .2098¢. Applying this rate to interstate charters flown by Skyline, 1973-1975, its dollar volume for such period appears to be Five Thousand Two Hundred Eighty-One Dollars Fifty Cents ($5,281.50). Applying the same rate to its 1976 interstate charters of one thousand eight (1,008) miles, income seems to be Two Hundred Eleven Dollars Forty-Seven Cents ($211.47), or a total of Five Thousand Four Hundred Ninety-Two Dollars Ninety-Seven Cents ($5,492.97) interstate charter income for the period 1973 through October 19, 1976.

The landmark decision with regard to the requisite jurisdictional showing in Sherman 2 violations is *United States* v. *Yellow Cab Co.,* 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947). That decision makes it clear (p. 222) that although Section 1 of the Act outlaws unreasonable restraints on interstate commerce, regardless of the amount of the commerce affected, jurisdiction under Section 2 of the Act cannot be supported unless some *appreciable* part of interstate commerce is the subject of a monopoly, a re-

straint or a conspiracy. There it was held, in 1947, that the interstate purchases of replacements for some five thousand (5,000) taxicabs constituted an appreciable amount of commerce.

A. E. Fletcher Co. v. *Rock of Ages Corp.*, (C.C.A. 2nd, 1963) 326 F.2d 13, is also in point. There, defendant owned the sole quarry producing Bethel White granite. Plaintiff sued defendant for an injunction and damages, alleging that defendant refused to sell it rough quarried Bethel White granite on reasonable and normal commercial terms in sufficient quantity to permit plaintiff to supply the same in connection with a bid plaintiff was attempting to make where the specifications called for such granite. The violation charged was under Sherman 2, and the Court stated, p. 17:

> "It (plaintiff) had to rely, not on Section 1 of the Sherman Act, but on the harder test of Section 2. Although that section condemns actual or attempted monopolization of 'any part of the trade or commerce among the several states, or with foreign nations,' it is settled that this means a market constituting 'some appreciable part'. *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 225, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947); *United States* v. *Griffith*, 334 U.S. 100, 106-7, 68 S.Ct. 941, 92 L.Ed. 1236 (1948)."

The Court noted that the adverse competitive impact referred to but a single project where an injunction bond had been set at Twenty-Five Thousand Dollars ($25,000.00), and stated, p. 17:

> "We know of no reason or precedent for considering so small a market an 'appreciable part.' See report of the Attorney General's National Committee to Study the Anti-Trust Laws, 44-48 (1955). Despite the conventional anti-trust trappings with which the case has been draped, what we have here, so far as the papers show, is an essentially private squabble between two sets of energetic Yankee businessmen."

All that is then left of Skyline's proof in this regard is its showing in connection with interstate charter flights. We respectfully suggest that there is no well reasoned Federal case which holds, or even intimates, that a dollar volume in interstate commerce of Five Thousand Four Hundred Ninety-Two Dollars Ninety-Seven Cents ($5,492.97) over a forty-six (46) month period can be defined as an appreciable part of interstate commerce.

The very language of the opinion of the Court of Appeals here forcefully suggests a basic misunderstanding of the requirements of *Yellow Cab* when it finds that Horizon's attempt to monopolize "had a direct and substantial effect on interstate commerce in the greater Kirksville area." The apparent reasoning of the Court removes all objective criteria having to do with the quantity and flow of commerce between the several states, and creates a rule (never announced by this Court) which would, by logical extension, make subject to the strictures of 15 USC 2 an attempt to monopolize *any*, rather than an *appreciable* part of interstate commerce. The plain wisdom of *Yellow Cab* is that at some point the test must be quantitative. The same wisdom is contained in *United States* v. *Paramount Pictures*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260.

Lawrence H. Eiger, in 25 Federal Bar Journal 283, points up the confusion which sometimes exists with regard to necessary jurisdictional showings for Sherman 1 and Sherman 2 violations, stating at p. 293:

> "A word ought to be injected concerning the quantity of interstate commerce which is necessary to activate

the Sherman Act. It is often said that the amount of commerce which suffers the impact of a violation is totally immaterial to the act. This is literally true, however, only in a Sherman Section 1 case. A violation of Section 1 may involve only a single shipment in commerce and still satisfy the statute. The language of Section 2, however, makes monopolization of 'any part' of commerce unlawful, without specifying what size the affected part of commerce must be. The Supreme Court in *U. S.* v. *Yellow Cab Co.*, 332 U.S. 218, 229 (1947) held that it would be sufficient if an 'appreciable' part of interstate commerce were subject to the monopoly or conspiracy."

In his Anti-Trust Analysis, Problems, Texts, Cases, 2nd edition, Professor Phillip Areeda, professor of law, Harvard University, points up the probable dangers of an over-broad interpretation of Sherman 2, at p. 259:

"It should be emphasized that 'monopoly' is used in this paragraph in the particular sense previously stated. The immediate analysis may logically permit an exceedingly broad definition of Section 2, but it certainly does not compel the comprehensive application of Section 2 to every unfair act touching interstate commerce. To do so would certainly surprise the reasonable expectations of businessmen, would involve the Federal courts in a heavy and difficult burden, and might also discourage desirable competition by making more competitive moves the possible occasion for an anti-trust suit."

It has many times been held by this Court that a variety of activities are beyond the scope of the Sherman Act. Without doubt, one such is an activity which does not affect an appreciable part of interstate commerce. There is an astonishing dearth of authority of this point.

The value of 5,000 taxicabs was not intended by this Court to be the lower limit for the application of Section 2 of the Sherman Act, but surely it was never intended by Congress or this Court that an attempt to monopolize an activity whose gross dollar impact on interstate commerce amounted to an average of only $120 per month should be proscribed by the Act, regardless of the relevant geographic market area.

It is perhaps not impertinent to suggest that Professor Areeda's point is a valid one. Federal Courts are overburdened at every level. Vigorous competition between small businesses, essentially local in character, is to be encouraged and is, in fact, one of the very purposes of the Sherman Act. Where the public consequences of an activity are unmistakably minimal, the penalties of the Sherman Act are harshly disproportionate to any possible public harm. This Court has yet to write the definitive Sherman 2 decision. Should it now elect to do so, the Bench, the Bar, and the public generally can only greatly benefit, judicial resources will be conserved, and private time and money which may otherwise be consumed in litigation of this kind can instead be devoted to the production of goods and services.

II.

The decision of the Court of Appeals affirmed a recovery under 15 USC 2, notwithstanding that the uncontroverted proof showed that Horizon's activities of which Skyline complained did not affect the interstate aspect of Skyline's business, contrary to the applicable decisions of this Court.

Even if plaintiff were to somehow escape the grasp of *Yellow Cab*, supra, an equally formidable jurisdictional obstacle remains in its way. It is not enough to support

Sherman 2 jurisdiction that a business having an interstate aspect be subjected to proscribed business behavior, because the rule is that the alleged restraint must adversely operate on the interstate aspect of the business. In *Page* v. *Work,* (C.C.A. 9th, 1961) 290 F.2d 323, the Court held:

> "The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business."

Nor will it avail plaintiff anything to insist, as it doubtless will, that it acquired some of its stock and supplies from out-of-state sources or that it sold gasoline, for a few months, to occasional transient out-of-state pilots. Such activities entail only an incidental flow of supplies in interstate commerce. Just such an issue was presented in *Lieberthal* v. *North Country Lanes, Inc.,* (C.C.A. 2nd, 1964) 323 F.2d 269, where the Court held that the operation of bowling alleys, without more, must be held to be a wholly intrastate activity, which could be said with equal accuracy about Skyline's activities in the areas of freight hauling, flight training, plane rentals and material purchases. The Court cited *Page* with approval and held that the incidental flow of supplies in interstate commerce do not in themselves suffice to transform an essentially intrastate activity into an interstate enterprise.

The essential point here is that Skyline's only arguably interstate operation was its charter service. However, and this is of primary importance, Skyline made no proof of any proscribed activity on the part of defendants which directly affected its charter service. Skyline's economist, Dr. Kuhlman, did not so testify, stating only that it was his opinion that Horizon did engage in predatory pricing in its aircraft rental and flight training, purely local

activities, based on information furnished him by Skyline's accountant witness, Hickman. The record is innocent of any proof whatever that Horizon's charter rates were below normal or in anywise anti-competitive or predatory. Thus, on the basis of all the evidence, Skyline's only arguably interstate activity was unmolested by defendants.

III.

The decision of the Court of Appeals in this case creates the rule that the filing of a single isolated suit by Horizon against Skyline could be later employed by Skyline as evidence of intent to monopolize, abrogating Horizon's First Amendment right to have access to the Courts, without penalty, contrary to the applicable decisions of this Court.

It is uncontroverted in this case that the anti-trust suit filed by Horizon against Skyline and others in May, 1973, was the only suit or proceeding of any kind ever filed by it against Skyline. The right of access to the Courts has repeatedly been held to be but one aspect of the right to petition for the redress of grievances secured by the First Amendment to the Constitution of the United States. The so-called "sham" exception to the general rule, in the anti-trust context, was first announced in *California Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 30 L.Ed.2d 642, 92 S.Ct. 609 (1972), a civil suit under Section 4 of the Clayton Act, 15 USC 15, for injunctive relief and damages instituted by respondents who were highway carriers, against petitioners who were also highway carriers operating within California. The charge was that petitioners conspired to monopolize trade in commerce and the transportation of goods in violation of the anti-trust laws by way of concerted action to institute state and Federal proceedings to resist and defeat applications by respondents to acquire operating rights or to transfer or

register those rights, including rehearings, reviews, appeals from agency or Court decisions and other legal processes. The trial court dismissed for failure to state a cause of action. The Court of Appeals reversed. The Supreme Court, Mr. Justice Douglas, affirmed, citing with approval *Eastern Railroad Conference* v. *Noerr Motor Freight,* 365 U.S. 127, 5 L.Ed.2d 464, 81 S.Ct. 523:

> "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to the Congress an intent to invade these freedoms." *Id.*, at 138, 5 L.Ed.2d at 471.

The Court held that petitioners' long-established pattern of activity, in many cases without apparent grounds, in itself constituted a violation of the Clayton Act. The Court made it clear, however, that one claim or suit would not of itself be violative of the Clayton Act and that what was required was a pattern of baseless, repetitive claims leading to the conclusion that the administrative and judicial processes were being abused.

A similar situation was presented in *Ottertail Power Co.* v. *United States,* 410 U.S. 366, 35 L.Ed.2d 359, 93 S.Ct. 1022, where the District Court found that *Ottertail* had brought numerous suits against municipalities for the purpose of delaying and preventing the establishment of municipal electrical systems with the expectation that such actvities would preserve its predominant position in the sale and transmission of electric power in the area. It further found that the mere pendency of these suits made it impossible for the affected municipalities to pass the necessary bond issues to build municipal generating facilities. At 35 L.Ed.2d 369, the Court again stated the requirement that before the filing of a suit could be deemed to be for the purpose of surpressing competition, there had to be evidence of repetitive suits carrying the hallmark

of insubstantial claims. As put by the Court in *California Transport,* 30 L.Ed.2d 648:

> "One claim, which a Court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the fact finder to conclude that the administrative and judicial processes have been abused."

The record is replete with testimony adduced by Skyline concerning all of the reasons why Horizon's anti-trust suit should never have been filed. Of even greater length is the proof Horizon thought necessary to adduce, in the context of a jury trial, showing all the reasons why the suit was filed, most importantly including that it was filed on the advice of counsel.

No single act of the trial court caused more mischief than its determination to admit in evidence the fact of the filing by Horizon of the 1973 anti-trust suit. The mischief was compounded when plaintiff proceeded to attribute its 1973 damage to the filing of such suit. The plain fact is that there is no reported Federal case holding that the filing of one (1), and only one (1) lawsuit against a competitior is an anti-competitive act condemned by either the Sherman or Clayton Acts. Proof of the filing of such lawsuits should never have gone in, defendants were irredeemably prejudiced, and did not, on account of this judicial error, receive a fair trial.

IV.

The decision of the Court of Appeals in this case conflicts with its own prior decisions and with decisions by Courts of Appeal for the Fifth and Seventh Circuits.

Skyline pleaded losses resulting from its failure to obtain a fixed base operator's contract from the City of

Kirksville, which failure it claimed was the result of the filing by Horizon of the "original" anti-trust suit. Glaspie testified at length in support of this theory. Skyline's accountant, Hickman, its only witness as to specific damage amounts, stated that all losses sustained by Skyline for the year 1973 could be directly traced to the filing of the original anti-trust suit. Glaspie was even permitted to testify, over objection, concerning the amount of attorney fees paid by him in the defense of that suit. Damages for 1973 to the date of trial in 1976, were submitted in one instruction, thereby combining the aforesaid 1973 losses with subsequent losses claimed by Skyline to have been caused by Horizon's predatory pricing.

Even if it be conceded that Horizon's filing of the "original" anti-trust suit was a proscribed act, and that its result was to prevent the consummation between Skyline and the City of Kirksville of a contemplated fixed base operator's contract, it would nonetheless have been erroneous to submit, as the lower Court here did, any damages alleged to have flowed therefrom, because an unconsummated contract is neither "business" nor "property" within the meaning of the Clayton Act, 15 USC 15. The law in this regard in the United States Eighth Judicial Circuit, although ignored by the Court of Appeals in this case, is made plain by *Duff* v. *Kansas City Star Co.*, (C.C.A. 8th, 1962) 299 F.2d 320, where it was unequivocally held that even if the Star prevented plaintiff from resuming the publication of a newspaper which had been out of business for many years, no submissible case was made under Section 4 of the Clayton Act, 15 USCA 15, because plaintiff had, after lapse of eight (8) years, neither business nor property which could have been damaged by the Star's monopoly. The alleged prevention of the consummation of anticipated contracts was the complaint in *National Wrestling Alliance* v. *Myers*, (C.C.A. 8th) 325 F.2d 768,

and again this Court held that expectancies, no matter how bright, constituted neither business nor property under the Clayton Act, and the blighting thereof could not constitute a violation of the Sherman Act.

On the other hand, in *Woods Exploration and Prod. Co.* v. *Aluminum Co. of America*, 438 F.2d 1286 (C.C.A. 5th, 1971), cert. den. 404 U.S. 1047 (1972), and *Nichols* v. *Spencer International Press, Inc.*, 371 F.2d 332 (C.C.A. 7th, 1967), it was generally held that a prospective contract is a species of property, and making preparations to go into a business is the equivalent of a business. There is, accordingly, a conflict between the circuits on this significant point which this Court should resolve. It is respectfully submitted that the prevailing Eighth Circuit rule is the sounder, and enjoys the support of a majority of the judicial circuits.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

WILLIAM Y. FRICK
Northtown Shopping Center
P. O. Box 1045
Kirksville, Missouri 63501
Counsel for Petitioners, Arnold S. Barber, Nancy M. Barber, and Horizon Airways, Inc.

APPENDIX

APPENDIX A

JUDGMENT

(Filed October 22, 1976)

This action came on for trial before the Court and a jury, the Honorable James H. Meredith, District Judge, presiding, and the issues were duly tried and the jury rendered its verdict finding damages in the sum of $12,-500.00. Pursuant to the antitrust laws, 15 U.S.C. §15, such amount shall be trebled and a reasonable attorney's fee shall be allowed.

IT IS ORDERED, ADJUDGED, AND DECREED that the plaintiff Skyline Aviation, Inc., shall recover of the defendants Arnold S. Barber, Nancy M. Barber, and Horizon Airways, Inc., the sum of $37,500.00, plus a reasonable attorney's fee, with interest thereon at the rate of six percent per annum and costs.

Dated this 22nd day of October, 1976.

ORDER

(Filed October 29, 1976)

Plaintiff's attorneys have filed a motion for attorneys' fees requesting $68,958.29 at the rate of $50.00 per hour for partners in the firm, $30.00 per hour for associates, $40.00 per hour for co-counsel, and including expenses of $679.29. Since the filing of this motion, plaintiff's attorneys have filed a supplemental exhibit showing a total

of sixty-two additional hours of time for co-counsel which was not included in their first exhibit.

The jury in this case awarded damages in the sum of $12,500, which has been trebled.

The Court has carefully considered the motion of the plaintiff's attorneys and the motion in opposition thereto of the defendants' attorneys and oral arguments of both counsel, and concluded that the plaintiff's attorneys' request is not unreasonable insofar as the number of hours spent or the charges allotted thereto, however, in view of the size of this award, the attorneys' fees requested should not be allowed. The Court is aware of the difficulties attendant in the trial of this particular case, the ability of both counsel for the plaintiff and for the defendants, and concludes that a reasonable attorneys' fees should be awarded in the sum of $15,000, plus expenses in the sum of $679.29. Accordingly,

IT IS HEREBY ORDERED that the total sum of attorneys' fees and expenses in the sum of $15,679.29 be and the same are allowed and are hereby included in and made a part of the judgment of October 22, 1976.

Dated this 29th day of October, 1976.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1178
Skyline Aviation, Inc.,
Appellee,

v.

Arnold S. Barber, Nancy M. Barber and
Horizon Airways, Inc.,
Appellants.

No. 77-1215
Skyline Aviation, Inc.,
Appellant,

v.

Arnold S. Barber, Nancy M. Barber and
Horizon Airways, Inc.,
Appellees.

Appeal and Cross-appeal from the United States District Court for the Eastern District of Missouri

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Submitted: November 15, 1977
Filed: December 9, 1977

Before GIBSON, Chief Judge, LAY and STEPHENSON, Circuit Judges.

PER CURIAM.

Skyline Aviation, Inc. brought this suit under 15 U.S.C. § 15 against Horizon Airways, Inc. and its officers for injuries sustained by reason of Horizon's alleged viola-

of section 2 of the Sherman Act, as amended, 15 U.S.C. § 2. The cause was submitted to a jury which returned a verdict in favor of Skyline in the amount of $12,500. The verdict was trebled (15 U.S.C. § 15) and the district court awarded attorney fees to Skyline in the amount of $15,000. In No. 77-1178 Horizon appeals the jury's verdict. In No. 77-1215 Skyline appeals the attorney fee judgment seeking a higher award.

Skyline and Horizon are two small competing airlines in the Kirksville, Missouri, area. In 1973 the city of Kirksville solicited bids for a fixed-base operator at the city airport. A fixed-base operator is one that provides facilities, fuel, equipment, supplies and services at an airport which are used by aircraft, crews, passengers and in handling freight connected therewith. Both the plaintiff, Skyline, and the defendant placed bids with the city of Kirksville. Plaintiff Skyline's bid was accepted, and plaintiff thereafter began preparation to take over as the fixed-base operator for the airport. On May 25, 1973, an antitrust suit was commenced by defendant Horizon against the city of Kirksville, the plaintiff, and the plaintiff's principal owners. This action was subsequently dismissed by the district court[1] on April 2, 1974.

The instant cause was filed on December 4, 1974, by Skyline Aviation. The complaint was amended on February 11, 1975, and alleged unlawful activities of Horizon Airways, described as "Sherman 2 attempt to monopolize." In particular, the complaint alleged the following wrongful activities by Horizon Airways: (1) The filing of the antitrust suit on May 25, 1973, which caused the city of Kirksville to fear contracting with the plaintiff and ultimately to refuse to contract with plaintiff, and (2) that

1. The Honorable James H. Meredith, Chief Judge, United States District Court for the Eastern District of Missouri.

Horizon charged prices for charter flights below its cost of operation, provided flight instruction below its cost of operation, falsified records in an attempt to receive approval from the Missouri Department of Education so as to obtain benefits from the Veterans Administration by operating an approved flight school with the intent to damage and destroy Skyline's similarly approved flight school instruction, and attempted to interfere with Skyline's flight training business through interference with student training furnished by Skyline's president to Northeast Missouri State University at Kirksville.

In this appeal Horizon initially contends that the court erred in submitting this cause to the jury because Skyline failed to prove that the activities of Horizon of which Skyline complained affected an appreciable part of interstate commerce or affected the interstate aspects of Skyline's business.

We are satisfied from our review of the record that the evidence adequately supports the court's submission and the jury's finding that Horizon's attempt to monopolize had a direct and substantial effect on interstate commerce in the greater Kirksville area. *See United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947).

Horizon next complains that Skyline's proof of damages was so vague, inexact and imprecise as to lack probative value. We disagree. The trial court instructed the jury that it was essential to recovery that Skyline establish that damage to its business and property was directly and proximately caused by the illegal conduct complained of, and, if so established, "the circumstances that the precise amount of plaintiff's damages may be difficult to ascertain should not affect plaintiff's right to recover, particularly if the defendants' wrongdoing has caused the difficulty in determining the precise amount."

The jury was cautioned, however, that "the plaintiff is not to be awarded damages based on guesswork or speculation."

Our review of the evidence discloses that a submissible issue on Skyline's damages existed. We find adequate support in the record for the jury's verdict.

Horizon finally contends that the trial court erred in permitting Skyline to offer proof of the filing by Horizon in 1973 of the single unsuccessful antitrust suit against Skyline. Horizon argues its action was protected under the first amendment. *California Transport* v. *Trucking Unlimited,* 404 U.S. 508 (1972). The trial court carefully instructed the jury that the evidence concerning the antitrust suit "may be considered by you in connection with the issue of whether or not the defendants formed an intent to attempt to monopolize * * * [and] whether or not the filing of such suit by defendant Horizon Airways, Incorporated, was in good faith and for the purpose of attempting to protect its business interests." As so limited the admission of this evidence was not error.

Skyline in its cross-appeal contends that the trial court's failure to award reasonable compensation in accordance with controlling law was clearly erroneous. Skyline had requested attorney fees in the sum of $68,279.00 and expenses of $679.29. The trial court made a finding that

> the plaintiff's attorneys' request is not unreasonable insofar as the number of hours spent or the charges allotted thereto; however, in view of the size of this award [$12,500 before trebling], the attorneys' fees requested should not be allowed. The Court is aware of the difficulties attendant in the trial of this particular case, the ability of both counsel for the plaintiff and for the defendants, and concludes that a reasonable attorneys' fee should be awarded in the sum of $15,000, plus expenses in the sum of $679.29.

Horizon charges that the attorney fees claimed are excessive, pointing out, among other things, that the trial lasted a little over three days. We are satisfied from our review of the record that the district court did not abuse its discretion in fixing the attorney fees. *See discussion in Grunin* v. *International House of Pancakes,* 513 F.2d 114, 126-29 (8th Cir. 1975).

Affirmed.

Costs including those stated in Skyline's motion for costs will be taxed to appellants.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

[Not to be published.]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1977

77-1178

Skyline Aviation, Inc.,
Appellee,

vs.

Arnold S. Barber, et al.,
Appellants.

77-1215

Skyline Aviation, Inc., etc.,
Appellant,

vs.

Arnold S. Barber, et al.,
Appellees.

Appeals from the United States District Court for the Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellants-appellees Arnold S. Barber, et al. and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

January 4, 1978

APPENDIX D

CONSTITUTION OF THE UNITED STATES

AMENDMENTS TO THE CONSTITUTION

AMENDMENT I—FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTES

28 USC § 1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

15 USC § 2. Monopolizing trade a misdeameanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdeameanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 USC § 4. Jurisdiction of courts; duty of United States attorneys; procedure

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

15 USC § 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

No. N 74-33C

SKYLINE AVIATION, INC.,
Plaintiff

vs.

ARNOLD S. BARBER, NANCY M. BARBER,
and HORIZON AIRWAYS, INC.,
Defendants

SATISFACTION OF JUDGMENT

Comes now Douglas F. Browne, of the Hannibal, Missouri, Law Firm of Rendlen, Rendlen and Ahrens, and states that the Judgment rendered in this cause on October 22, 1976 (and the Order dated October 29, 1976, which is included in and made a part of said Judgment) has been fully satisfied by the defendants herein. (This satisfaction includes said Judgment, Order, interest and costs, including costs of any executions and garnishments; but does not include any Judgments regarding attorney fees on appeal, or costs of appeals taken or accrued after this date.)

Accordingly, all executions and garnishments based upon said Judgments (except for Judgments on appeal above set forth), are withdrawn, nor should the garnishees under executions based on the aforesaid Judgments be required to come into Court pursuant to said executions and garnishments.

The above SATISFACTION is made with full authority from, and by, Skyline Aviation, Inc., Rendlen, Rendlen and Ahrens, Leon B. Seck Attorney from Harrisonville, Missouri, and the Bank of Kirksville, Missouri.

A duplicate original of this SATISFACTION has this day been forwarded for filing to the Clerk, United States District Court, St. Louis, Missouri.

Rendlen, Rendlen and Ahrens

By /s/ Douglas F. Browne
108 North Third Street
Hannibal, Missouri 63401

STATE OF MISSOURI)
) SS
COUNTY OF MARION)

On this 17th day of March, 1978, before me personally appeared Douglas F. Browne, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at my office in Hannibal, Missouri, the day and year first above written.

My term expires December 25, 1978.

/s/ Mary L. Cobb
Notary Public

(Seal)